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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAROD LAMARR DICKERSON, JR.,

Defendant and Appellant.

C086401

(Super. Ct. No. 17FE004639)

A jury convicted defendant Jarod Lamarr Dickerson, Jr., of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),¹ assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), and two counts of unlawfully brandishing a deadly weapon (§ 417, subd. (a)(1)). In bifurcated proceedings, a jury found true the allegation that defendant had a prior serious felony conviction. The trial court sentenced

¹ Undesignated statutory references are to the Penal Code.

defendant to state prison for an aggregate term of 11 years, including the midterm for the primary offense (§ 245, subd. (a)(1)) and a five-year enhancement for his prior serious felony (§ 667, subd. (a)).

On appeal, defendant contends the trial court erred in trying, in his absence, the allegation that he had a prior serious felony conviction. (§ 667, subds. (a)-(i).) He also argues the trial court abused its discretion in refusing to appoint a mental health professional to reexamine defendant after defense counsel questioned his competence during the sentencing hearing. In supplemental briefing, defendant further requests we remand the case to permit the trial court to exercise its discretion to strike his serious felony enhancement pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2) (Senate Bill 1393).

We will affirm the judgment and remand the matter to allow the trial court to exercise its discretion to dismiss or strike the prior serious felony enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The instant offenses*

On the afternoon of March 12, 2017, defendant wielded and swung a machete in the front yard of a home in Sacramento County. The homeowner and several neighbors confronted defendant and attempted to get him to leave. Defendant responded by waving the machete and jumping toward the group. The neighbors armed themselves with sticks and poles and threw things at defendant. Police eventually arrived and took defendant into custody without incident. At trial, defendant argued he was acting in self-defense and had not assaulted anyone.

2. *First request for competency evaluation*

In July 2017, doubt arose as to defendant's competence to stand trial. (§ 1368.) The trial court suspended criminal proceedings and appointed a psychologist to examine defendant. (§ 1369, subd. (a).) The psychologist opined in her September 2017 report that defendant was competent to stand trial. She noted that while defendant "rambled"

and asserted his “real name” was “Silent Night,” he was “aware” of the charges pending against him, and acknowledged that his name had nothing to do with the pending legal issues. Defendant demonstrated an understanding of criminal proceedings and an ability to assist counsel in a rational matter. The psychologist found that defendant likely suffered from an antisocial personality disorder and demonstrated stimulant use, but concluded that antipsychotic medication “would serve no purpose” and was “not medically appropriate.” Later that month, the trial court found defendant competent and reinstated proceedings.

3. *Trial*

During jury selection, defendant grew upset with his attorney and voluntarily absented himself from the proceedings. Defendant eventually returned and was present for all witness testimony and during closing arguments.

When the jury informed the trial court that it had reached a verdict, the court contacted the jail to request defendant be brought to court. Defendant refused to be transported to the hearing, and the court found defendant had voluntarily absented himself. Defense counsel agreed to the court’s request that if it was necessary to hold a trial on the prior conviction allegation, she would attempt to visit defendant at the jail during the lunch recess to ascertain whether he still was refusing to come that afternoon. After the jury read its verdicts, the trial court recessed for lunch.

When proceedings resumed that afternoon, the trial court held a jury trial on the prior conviction allegation. There was no discussion on the record about whether defense counsel had met with defendant during the lunch recess. The trial court reviewed the prosecution’s exhibits (a section 969b packet and a certified prior conviction packet), and found defendant was the person in the documents, even though the documents listed defendant as “Jarod Mamarr Dickerson,” and he had identified himself at trial as Jarod Lamarr Dickerson, Jr. The jury found true the allegation that defendant was convicted of robbery in August 2008.

4. Sentencing hearing and second request for competency evaluation

Defendant refused to be transported to court for the originally scheduled sentencing hearing in January 2018, so the court continued the hearing and ordered defendant be extracted from his cell and brought to court for the next hearing.

During the sentencing hearing held later that month, the trial court denied defendant's motion to strike his prior strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). It also denied defendant's motion to reduce the charges to a misdemeanor. (§ 17, subd. (b).)

As the court proceeded to consider sentencing, defendant repeatedly interrupted to argue his name was "Silent Night," rather than Jarod Dickerson. The court told defendant he needed to "stop right now," but defendant continued talking about his name. Defendant said a blood test would prove his identity, asking the court to "[b]ring all my discovery if you have it." The defendant noted that a psychologist had previously found him competent, before continuing: "I own my own sovereignty. . . . [¶] . . . [¶] I dropped blood so you could be here safely. [¶] . . . [¶] I damn near died so you can be alive and your people. [¶] . . . [¶] I am Silent Night. I have to do this." The court informed defendant he would be removed unless he stopped. Defendant responded he would not be quiet and said, "Have me removed right now. [¶] . . . [¶] That's the only way I'm going to stop" The court found defendant had asked to be removed from the courtroom and ordered him escorted out.

Defense counsel requested the court appoint someone to evaluate defendant's competence, based on defendant's behavior during the hearing. She argued defendant was unable to work with her on sentencing and had refused to meet with her to discuss the probation report, the *Romero* motion, and the section 17 motion. During the sentencing hearing, defendant said he did not "get along" with his lawyer. He also said he was only there because the court had ordered him extracted from his cell.

The court denied the request, noting it had observed defendant's conduct throughout the proceedings and found it to be "calculated" so as to be "disruptive and to undermine the orderly proceedings in this court." Although defendant "yell[ed] and scream[ed]" while the court was pronouncing sentence, he was "very cogent" in talking with escort officers. In addition, defendant had recently been found competent by a psychologist.

DISCUSSION

I

A criminal defendant's right to be present at trial is protected under the state and federal Constitutions, as well as by sections 977 and 1043. (*People v. Espinoza* (2016) 1 Cal.5th 61, 72; see also *People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) A defendant may waive his right to be present, including by voluntarily absenting himself from the trial. (§ 1043, subd. (b)(2); *Espinoza*, 1 Cal. 5th at p. 72.) Whether a defendant is absent voluntarily depends on the " 'totality of the facts.' " (*Espinoza, supra*, at p. 72.) We review for substantial evidence a trial court's finding of voluntary absence. (*Id.* at p. 74.)

Despite refusing to be transported from jail to the courthouse that morning, defendant contends the record fails to establish that he voluntarily, knowingly, and intelligently waived his presence during the prior conviction proceedings. Defendant argues there is no evidence that he knew such proceedings would be held that day, and the record is unclear as to why he refused transportation. Defendant points to his presence at all of the proceedings after jury selection as evidence that he wanted to be present that day.

The People argue defendant forfeited the issue because his counsel did not object to starting the proceedings on the prior conviction allegation, despite defendant's absence. Regardless, defendant's contentions are without merit because substantial evidence supports the trial court's finding that defendant voluntarily absented himself.

Although defendant had attended prior proceedings and the record does not specify exactly why defendant refused to come to court that day, it is reasonable to infer that defendant voluntarily chose not to attend. On the record before us, we find no error in the trial court's decision to proceed with trial in defendant's absence.

II

Defendant also contends the trial court abused its discretion in refusing his counsel's request during the sentencing hearing to appoint a mental health professional to reexamine his competence. We disagree.

“A defendant is incompetent to stand trial if [he] lacks ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him.’” [Citations.]” (*People v. Mickel* (2016) 2 Cal.5th 181, 195; see also § 1367.) If the trial court has already held a competency hearing and found the defendant competent to stand trial, it is unnecessary to conduct a second competency hearing unless the trial court is “‘presented with a substantial change of circumstances or with new evidence’ casting a serious doubt on the validity of that finding.” (*People v. Jones* (1991) 53 Cal.3d 1115, 1153.) In such situations, a trial court “may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state.” (*Ibid.*) The trial court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard. (*People v. Welch* (1999) 20 Cal.4th 701, 742.)

According to defendant, there was a substantial change of circumstances due to his “deteriorating mental condition” during the four and a half months between the September 2017 psychologist report finding him competent to stand trial and the January 2018 sentencing hearing. Defendant notes that, in addition to his unusual behavior during the sentencing hearing, he refused to visit with his attorney to review the

sentencing motions and probation report. He also refused to attend the sentencing hearing and had to be extracted from his cell.

Although defendant's behavior before and during the sentencing hearing was relevant to the issue of his competency, the trial court observed defendant and concluded that he had acted in a "calculated" fashion, so as to be "disruptive and to undermine the orderly proceedings in this court." Defendant also had "rambled" about his "real name" to the court-appointed psychologist, but she still opined in her September 2017 report that defendant demonstrated an understanding of criminal proceedings and could assist counsel in a rational matter. In addition, during the sentencing hearing, the trial court described defendant as "very cogent" in talking with escort officers. We do not believe the record before us reflects a substantial change of circumstances or new evidence casting doubt on the first competency finding that would have required the court to order a second competency hearing. Accordingly, we conclude that the trial court did not abuse its discretion in not declaring a doubt as to defendant's competence to stand trial.

III

Defendant's sentence includes a five-year prior serious felony enhancement pursuant to section 667, subdivision (a). At the time defendant was sentenced, the court had no discretion to strike such an enhancement. (See former §§ 667, subd. (a), 1385, subd. (b).)

Senate Bill 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019, amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes.

Defendant argues that the amendments apply retroactively to his case, which is not yet final. He asks us to remand the matter so the trial court may exercise its new discretion and consider striking the prior serious felony enhancement. The People concede, and we agree.

Absent evidence to the contrary, amendments to laws—like Senate Bill 1393—that either reduce the punishment for a crime or vest in the trial court the discretion to impose a lesser punishment, apply to all defendants whose judgments are not final as of the amendment’s effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 745-748; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) There is nothing in Senate Bill 1393 suggesting the Legislature intended it to apply prospectively only, so it applies retroactively here.

Although the trial court denied defendant’s *Romero* motion citing his extensive criminal record and poor prospects for rehabilitation, we cannot conclusively determine from the record that remand would be a futile act. Indeed, neither party argues that the trial court clearly indicated that it would have declined to exercise discretion to dismiss the enhancement under the new law. Accordingly, the appropriate remedy is to remand the matter so that the trial court may exercise its discretion as it deems appropriate. (See *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [“ ‘ “[d]efendants are entitled to sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court” ’ ”]; cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand for consideration of new discretion under § 12022.53, subd. (h) inappropriate if “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] . . . enhancement” even if it had the discretion].)

DISPOSITION

The judgment is affirmed. The matter is remanded for the limited purpose of allowing the trial court to exercise its discretion under Senate Bill 1393 (2017-2018 Reg. Sess.) to dismiss or strike the five-year term that was imposed based on defendant’s prior serious felony conviction. If the enhancement is stricken, the trial court is directed to

prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____KRAUSE_____, J.

We concur:

_____RAYE_____, P. J.

_____ROBIE_____, J.